reference to the two deep tanks was done in the interests of, and for the purposes of, the ship and was in the management of the ship. The negligence in the management of the pump was negligence in the management of the ship within section 4(2)(a) of the United States Carriage of Goods Act, 1936.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Godwin & Co.; Drew & Napier.*

MALAYAN MOTOR AND GENERAL UNDERWRITERS (PTE.) LTD. v. ABDUL KARIM & ANOR.

[C.A. (Kulasekaram, Sinnathuray & D'Cotta JJ.) October 13, 1981]

[Singapore — Civil Appeal No. 46 of 1980]

Insurance — Marine Insurance — Indemnity — Claim for loss of missing timber — Vendors paid for loss to purchasers — Whether purchasers as assignees of marine policy could sue underwriters — Marine Insurance Act, 1906 (U.K.), s. 50(2).

Shipping Law — Bills of lading containing words "132 bundles said to contain 5,893 pieces of sawn Keruing Timber" — Letter of indemnity — Removal of words "said to contain" from bill of lading — Expedient method.

The plaintiffs purchased 5,893 pieces of sawn keruing timber from Pacific Corporation Traders (the vendors) on c.i.f. terms for shipment to Hodeidah on the vessel "Supreme Trader". Upon arrival and after discharge 1,768 pieces valued at $17,757.40 were found missing. The shipment was insured in the name of the vendors with the defendants under an all risks policy of marine insurance for US$25,734. When the loss was discovered, the vendors who had been paid by their Bank for the timber, for good business relationship, settled the plaintiffs' claim for the value of the missing timber.

The plaintiffs then brought the present action against the defendants under the policy for the value of the missing timber. At the trial the defendants contended that as the marine policy was a policy of indemnity, and as the plaintiffs had suffered no loss, their claim for the value of the missing timber having been settled by the vendors, the defendants were not liable under the policy. The said letter of indemnity was given to remove the words "said to contain" from the claused bill of lading: "132 bundles *said to contain* 5,893 pieces of sawn keruing Timber". The learned Chief Justice rejected the contention for the defendants. The defendants appealed.

Held, dismissing the appeal: (1) under section 50(2) of the Marine Insurance Act, 1906 of England which is applicable in Singapore, by the assignment, there was vested in the plaintiffs the beneficial interest in the said policy, and the plaintiffs were entitled, as they had done, to sue thereon in their own name. Hence, as the defendants had admitted the loss of 1,768 pieces of timber, and the value thereof was agreed between the parties, the learned Chief Justice properly gave judgment for the plaintiffs;

(2) the defendants erred in their contention that the plaintiffs by the settlement had been indemnified for the loss of the missing timber. Under the contract of indemnity the defendants had not paid any money to the plaintiffs to reduce the loss suffered by them;

(3) in this case there was no misrepresentation of any kind relating to the apparent condition of the timber by the removal of the words "said to contain" in the bill of lading. By the removal of those words the shippers and carriers were merely employing an expedient method of avoiding delay and overcoming a difficulty out of proportion to its importance had the carriers been required to check on the pieces of timber.

Cases referred to:-

(1) *Stearns* v. *Village Main Reef Gold Mining Co. Ltd.* 10 Com. Cases 89; (1905) 21 T.L.R. 236.

(2) *Brown Jenkinson* v. *Dalton* [1957] 2 Q.B. 621, 633.

CIVIL APPEAL.

D.H. Murphy for the appellants.

Haridass Ajaib for the respondents.

Cur. Adv. Vult.

Sinnathuray J. (delivering the judgment of the Court): When this action came on for hearing before the learned Chief Justice, no evidence was led as the parties had agreed on the following facts.

The plaintiffs purchased 5,893 pieces of sawn keruing timber from Pacific Corporation Traders (the vendors) on c.i.f. terms for shipment to Hodeidah on the vessel "Supreme Trader". Upon arrival and after discharge 1,768 pieces valued at $17,757.40 were found missing. The shipment was insured in the name of the vendors with the defendants under an all risks policy of marine insurance for US$25,734.

When the loss was discovered, the vendors who had been paid by their Bank for the timber, for good business relationship, settled the plaintiffs' claim for the value of the missing timber. There is this letter from the plaintiffs to the vendors which speaks for itself.

"Our Ref: CL/47

Date 20th May, 1976

Messrs Pacific Corporation Traders,
G.P.O. Box No. 1322,
Singapore.

Dear Sirs,

Re: Policy No. 1075C4607 per m.v. "SUPREME TRADERS"

We would be obliged if you could act for us and appoint solicitors in Singapore to recover our loss suffered as a result of short landing of 1811 pcs. of Sawn Timber. In view of our good business relationship, please also let us have a reduction of the Invoice by the said sum of $24,965.02. When you recover the said loss from the Insurance Company on our behalf you may retain this amount as due from us to you in your Invoice No. 786/110/307/75.

You may also come to best settlement with Insurance Company.

Thanking you,

Yours faithfully,
for ABDUL KARIM A.R. FARA & CO.,

(Sgd.) AMIN A.R. FARA ALASWADI
Managing Director."

The way the settlement was put through by the vendors was that they instructed their Bank who had purchased the bill of lading relating to the shipment to accept from the drawees in full settlement a lesser sum than the amount of the bill. The Bank having received from its correspondent Bank that lesser sum, the shortfall from the amount of the bill and the amount received was debited by the Bank to the account of the vendors.

The plaintiffs then brought this action against the defendants under the policy for the value of the missing timber. At the trial the defendants contended that as the marine policy was a policy of indemnity,

and as the plaintiffs have suffered no loss, their claim for the value of the missing timber having been settled by the vendors, the defendants were not liable under the policy. The learned Chief Justice rejected the contention for the defendants. He gave judgment for the plaintiffs for the agreed sum of $17,757.40 and costs. Against this judgment, the defendants appeal.

It is clear from the grounds of decision of the learned Chief Justice that he fully appreciated that in the instant case the marine policy, being a value policy, is a policy of indemnity, and of indemnity only. That the policy is a contract of indemnity is explained in his statement that "There was on the undisputed facts no money or other benefit received by the assured which ought to be taken into account in diminishing the loss against which the contract of indemnity is given." So it would have been that if the vendors (the assured) have brought this claim, the defendants (the insurers) on the facts admitted by them would have been bound to indemnify the vendors for the loss of the missing timber. The defendants would then, as the learned Chief Justice has observed, as underwriters be subrogated to the assured's right to recover the value of the missing timber from the carriers.

The question now is whether it makes any difference, as regards the case for the defendants, that the present claim is not by the vendors but by the plaintiffs.

It was never in dispute that the plaintiffs are the assignees of the marine policy. Under section 50(2) of the Marine Insurance Act, 1906 of England which is applicable in Singapore, by the assignment, there is vested in the plaintiffs the beneficial interest in the said policy, and the plaintiffs are entitled, as they have done, to sue thereon in their own name. So then, on the facts, as the defendants had admitted the loss of 1,768 pieces of timber, and the value thereof was agreed between the parties in the sum of $17,757.40, the learned Chief Justice properly gave judgment for the plaintiffs for the said sum.

But it is said for the defendants that the plaintiffs have in effect been indemnified, that any payment made to them would be an additional payment, and therefore judgment ought not to be given in their favour. With due respect to counsel, we are of the view that the submission is misconceived as it cannot be supported on the material facts.

When the timber of the vendors was shipped on board "Supreme Trader" for carriage from Singapore to Hodeidah, the legal property in the timber passed to the plaintiffs. So when 1,768 pieces of timber were found missing in Hodeidah, the vendors were not legally liable to compensate the plaintiffs for the loss of the missing timber. It was pursuant to the letter from the plaintiffs for "good business relationship" that the vendors agreed to give the plaintiffs a reduction in the purchase price. It is true that the effect of the reduction (referred to in these proceedings as "compensation" or "settlement") is that the plaintiffs have not suffered any direct loss for they only paid the vendors for the timber they actually received. But it is wrong to contend, as is contended for the defendants, that the plaintiffs by the settlement have been indemnified for the loss of the missing timber. The fact is the plaintiffs as assignees have not received any benefit from the defendants for the missing timber. Under the contract of indemnity the defendants have not paid any money to the plaintiffs to reduce the loss suffered by them. Because of the defendants' failure to indemnify them the plaintiffs instructed the vendors to act for them and appoint solicitors in Singapore to recover from the defendants for the loss suffered as a result of the short landing of the timber. The plaintiffs had also prevailed upon the vendors not to charge them for the missing timber. So then another effect, the material effect of the settlement between the plaintiffs and the vendors is that it is the vendors who had accepted the loss. The plaintiffs therefore very properly instructed the vendors that "when you recover the said loss from the insurance company on our behalf you may retain this amount as due from us to you". It seems to us that the settlement between the plaintiffs and the vendors was a fair way of resolving their business relations.

The settlement is also, as the learned Chief Justice pointed out, "in so far as concerns the defendant underwriters, *res inter alios acta*". The defendants dispute this finding. We were referred to *Stearns* v. *Village Main Reef Gold Mining Co., Ltd.*[1] In that case gold of the defendants which had been insured with the plaintiffs was seized by the South African Government. The plaintiffs having paid for the total loss, when they later found that the South African Government had made a sum of payment to the defendants, claimed that sum from the defendants. The Court of Appeal in affirming the decision of Walton J. held that on the facts the plaintiffs were entitled to be repaid the sum because the loss of the defendants was reduced by that amount.

We are of the view that the facts in our case are very different from the facts in *Stearns'* case. There the insurers had indemnified the assured: in our case nothing has been paid by the insurers. Another material distinction is in that case the assured was later compensated by the party that had caused the loss. In our case the assured has not (nor the assignees) received any payment from the carriers for the loss. The insurers therefore cannot assert, or even argue, that they are entitled not to make any payment. The point to be emphasised is neither the assured nor the assignees have received any money from anyone which as the learned Chief Justice has observed "ought to be taken into account in diminishing the loss against which the contract of indemnity is given".

Finally, it is contended for the defendants that the learned Chief Justice was wrong in holding that when the defendants meet the claim of the plaintiffs under the marine policy they would be subrogated to the vendors' right to recover the value of the missing timber from the carriers. Therefore, it is said that the plaintiffs were not entitled to judgment against the defendants.

The submissions as we have understood them are on these lines. First, it is said that the vendors were only entitled to a claused bill of lading for the timber

but that they had wrongfully obtained from the carriers a clean bill of lading by giving them in exchange a letter of indemnity. Reliance is had on *Brown Jenkinson* v. *Dalton*[2] where, it is urged upon us, the practice of obtaining clean bills of lading against letters of indemnity was condemned as illegal. Next, it is said, as the evidence is the defendants were not aware of the letter of indemnity when they issued the marine policy to the vendors, the letter of indemnity being illegal, the defendants as underwriters were entitled to repudiate liability and declare the policy null and void. Lastly, it is argued, because the vendors had given the carriers a letter of indemnity, they, the vendors, had acted to the prejudice of the defendants, and, as a result, the defendants' rights as subrogees to proceed against the carriers had been nullified by the act of the vendors. Therefore, the vendors cannot under the marine policy make a claim against the defendants. As the plaintiffs' claim against the defendants is as assignees, their claim too cannot be sustained against the defendants.

On the first point, we do not accept the submission that the decision in *Brown Jenkinson's* case was in such wide terms as to condemn the general practice of shippers obtaining from carriers clean bills against letters of indemnity where otherwise they would have received claused bills. What was held to be illegal in that case was the fraudulent obtaining of clean bills against letters of indemnity. In that case orange juice was shipped in old and frail barrels, some of which were leaking that claused bills of lading should have been given. But the carriers at the request of the defendants against a letter of indemnity given to them issued clean bills of lading stating that the goods shipped were in "apparent good order and condition". The Court of Appeal held (see: headnote at page 622) "that the shipowners by making in the bill of lading a representation of fact that they knew to be false with intent that it should be acted upon were committing the tort of deceit, and that the defendants' promise to indemnify the shipowners against loss resulting from the making of that representation was accordingly unenforceable". Morris L.J. said:

"The conclusion thus reached is one that may seem unfortunate for the plaintiffs.... There was evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon. That cannot in any way alter the analysis of the present transaction, but it may help to explain how the plaintiffs came to accede to the defendants' request. There may perhaps be some circumstances in which indemnities can properly be given. Thus if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading, while taking an indemnity in case it was later shown that there had in fact been some faulty condition. Each case must depend upon its circumstances."

Pearce L.J. too at pages 638/639 did not condemn the practice. He said that the "practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness." Lord Evershed M.R. delivered a dissenting judgment. He did not condemn the practice.

In our case the letter of indemnity was given to remove the words "said to contain" from the claused bill of lading: "132 bundles *said to contain* 5,893 pieces of sawn Keruing Timber". It is accepted in practice that the removal of the words "said to contain" makes the bill of lading a clean bill. The effect of the clausing however is that the carriers say they have not counted or checked the number of pieces of timber but that the shippers claim it to contain 5,893 pieces. In our judgment there is no misrepresentation of any kind relating to the apparent condition of the timber by the removal of the words "said to contain" in the bill of lading. By the removal of those words the shippers and carriers are merely employing an expedient method of avoiding delay and overcoming a difficulty out of proportion to its importance had the carriers to check on the pieces of timber. What would happen is, in the event of a dispute between the shippers and the carriers, the shippers would have to prove that they had in fact shipped 5,893 pieces of timber. They cannot rely on any apparent admission by the carriers in the bill of lading that the cargo received on board the ship was 132 bundles of 5,893 pieces of sawn Keruing timber.

There remains for us to say that the defendants were made aware of the letter of indemnity. They called for the letter, and it is to be expected that they considered it. A settlement was then effected. But the defendants in their defence put the plaintiffs to strict proof of their claim. However this was not canvassed at the trial. Before the learned Chief Justice the defendants accepted that the timber had been shipped. They admitted that the number of pieces lost was 1,768. They agreed that the value of the missing timber was $17,757.40. On these undisputed facts we are of the view that it was not open to the defendants to say that no loss had been proved by the plaintiffs which the defendants have to indemnify.

For all these reasons, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Godwin & Co.; Netto Low & Partners.*

C.F. SHARP & CO. (MALAYA) PTE. LTD. v. GRACE SHIPPING INC. & ANOR.

[C.A. (Wee Chong Jin C.J., Kulasekaram & Chua JJ.) October 15, 1981]

[Singapore — Civil Appeal No. 84 of 1980]

Shipping Law — Negotiations for charterparty — Whether agreement arrived at — Exchange of telexes — Standard form of charterparty — Whether ship's agents had authority to act.

In this case the appellants were ship's agents and shipbrokers. They were instructed by the second respondents (Hai Nguan) to find vessels to carry fertilizer from Rumania to Indonesia. One Hiswara of P.T. Bina Alam, an Indonesian firm, had agreed to buy the fertiliser from a Rumanian Company but he had arranged with Phillips Petroleum International Inc. (Phillips) for Phillips to be the purchasers who would resell the fertiliser to P.T. Bina Alam. Hiswara instructed, unknown to each other, Phillips and the second respondents, Hai Nguan to find vessels for carrying the fertiliser. Phillips instructed Stott Neilson and Hai Nguan instructed the appellants. The appellants negotiated with the shipbrokers, Polfracht, to charter vessels in the belief that the charterers were Phillips. They conducted the negotiations by